No. 77-1518

In the

Supreme Court of the United States

OCTOBER TERM, 1978

BIO-ANALYTICAL SERVICES, INC., a corporation,
Plaintiff-Respondent,

vs.

THE EDGEWATER HOSPITAL, INC., a corporation; and DR. MAURICE S. MAZEL,
Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES:

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Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 24, 1978, in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The judgment of the District Court, entered on August 1, 1975, was not officially reported. The judgment of the Court of Appeals, entered on October 28, 1977, is reported at 565 F.2d 450 (7th Cir. 1977). The Petition for Rehearing and Suggestion for Hearing in Banc was denied,

without opinion, on January 24, 1978. The opinions are attached as Appendix B to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a pending State action between the same parties and interests and involving the identical issue presented in this case required dismissal under the principles of comity and federalism.

2. Whether, under the circumstances of this case, involving a contract for professional services to be rendered by a medical Doctor, the Doctor is an indispensable party under "The Equity and Good Conscience" standard of Rule 19(b), F.R.Civ. Proc.

STATUTORY PROVISIONS

The statutory provisions involved are 9 U.S.C. §§ 2, 3, and 4 (the Federal Arbitration Act) and Ill. Rev. Stat. ch. 10 §§ 101, 102 (the State Uniform Arbitration Act). These provisions are printed in Appendix A to this Brief.

STATEMENT

Plaintiff, Bio-Analytical Services, Inc. ["Bio-Analytical"] brought this diversity action seeking an order to compel arbitration under an Agreement to which plaintiff and defendants were parties. The District Court dismissed the complaint on principles of comity, finding that the same basic case was already pending in the State Court and because a non-diverse party, Dr. Donald Mark, was indispensable. On appeal, the Court of Appeals reversed. Defendants—Petitioners in this court—seek review

of the Court of Appeals judgment. The pertinent facts are as follows.

Bio-Analytical and Defendant Edgewater Hospital entered into an agreement in 1972 by which Bio-Analytical and Dr. Mark, its president, ["Mark"] would perform services for the Pathology Department in return for a stated amount of compensation to be paid to Bio-Analytical. Although not a named party to the contract as an individual, the Agreement provided that all contemplated services were to be performed by Mark. Paragraph 14 of the Agreement states: it is the essence of this Agreement that Dr. Donald D. Mark shall render all of the services and perform all of the duties contemplated under this Agreement. Additionally, a "Personal Guarantee" was appended to the contract in which Mark guaranteed "the full, complete and punctual performance of all undertakings, obligations and duties . . . set forth in the Agreement. (par. 17.)

On July 14, 1975, Edgewater filed a complaint in the Circuit Court of Cook County against Mark and Bio-Analytical seeking damages and an accounting for Mark's alleged breach of contract. Bio-Analitycal and Mark appeared in the State Court proceedings and filed a motion to compel arbitration under a provision of the contract which they contend provides for mandatory arbitration of the disputes in question. Later, on that same day, Bio-Analytical filed this diversity action in the federal District Court seeking damages from defendants Edgewater Hospital and Dr. Maurice S. Mazel, its Medical Director ["Edgewater"] for an alleged breach of the same agreement, an injunction restraining interference with plaintiff and Mark's mail and property and an order to compel arbitration of disputes arising out of

the Agreement. The damage claims were later abandoned. (App. B. 10a) The defendants moved to dismiss on the grounds of comity and failure to join an indispensable party.

Following the filing of Edgewater's motion to dismiss Bio-Analytical filed a motion to compel arbitration and to stay State Court proceedings. As noted, Mark and Bio-Analytical also filed a motion in the State Court requesting the State Court to order arbitration, based on the same alleged arbitration agreement.

The District Court granted Edgewater's motion to dismiss because Mark [a nondiverse party] was indispensable and on principles of comity, based on the same claims pending in the State Court.

The State Court denied the motion to compel arbitration, after conducting an evidentiary hearing and finding *no binding agreement* between the parties to arbitrate their disputes arising out of the contract. Bio-Analytical and Mark appealed.

The Appellate Court of Illinois affirmed the Circuit Court's ruling that no agreement existed between the parties to submit their disputes to arbitration. *Edgewater Hospital* v. *Bio-Analytical,* ..... Ill. App. 3d ....., ... N.E.2d ..... (1st Dist. 1978), (See Appendix C to the petition.)

While the State Court action was pending on Appeal the Court of Appeals for the Seventh Circuit reversed the District Court's order of dismissal and remanded the case. (Appendix B, p. 7a). Edgewater has filed motions to dismiss arguing, *inter alia,* that the action is barred by virtue of the final judgments rendered in the State Court proceedings.

REASONS FOR GRANTING THE WRIT

In this diversity case the District Court dismissed the complaint for failure to join an indispensable party and on principles of comity because virtually the same case (but with the party claimed to be indispensable) was already pending in the State Court. Relying largely on cases decided during the eighteen months the case was under advisement, the Court of Appeals reversed.

The staggering backlog of *civil* cases in our district courts and in particular the major metropolitan courts, such as the Northern District of Illinois, caused by increased filings and required priority given criminal cases[1] is a well-known circumstance. Representatives of the federal judiciary, including this Court's distinguished Chief Justice, have repeatedly implored the Congress—and urged the Bar and the public to implore Congress—to help ease the burden by further limiting the jurisdiction of our federal courts and specifically to eliminate diversity jurisdiction.

In light of this national crisis, consider the opinion of the Court of Appeals for the Seventh Circuit in this case. The Court of Appeals compels the District Court to entertain this *diversity* suit even though the same case, presenting the same issues on behalf of the same interests, represented by the same counsel, is pending—in a much more advanced stage[2]—in the Courts of Illinois.

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[1] *See, e.g.* Footnotes & Dicta, "The Case Crunch in Our Federal Court, 57 Chi. Bar Rec. 64 (1975).

[2] The Appellate Court of Illinois has affirmed the Circuit Court's ruling that no agreement existed between the parties to submit their disputes to arbitration.

Moreover, disposition of the case in the State Court will be more complete and certain because the very party here argued to be indispensable is fully present and active in the State Court proceedings, represented by the same counsel and advancing the same arguments advanced by his corporation [Plaintiff-Bio-Analytical] in the federal court. What federal interest compels the Court of Appeals to burden a federal docket with this repetitious cause? The only federal interest referred to in the Seventh Circuit's opinion is the fact that Bio-Analytical "relies on the Federal Arbitration Act" 565 F.2d at 454, an act which was never invoked or even referred to by Bio-Analytical in the State Court, but which must be enforced by the State Court if applicable and which is virtually identical to the State law [the Uniform Arbitration Act] which is relied upon by Bio-Analytical in the State Court. More important, the State Court—after an extended evidentiary hearing and argument—found as a matter of fact that there *was no agreement by the parties to arbitrate,*[3] making the application of any Arbitration Act moot.

This case has been remanded to the District Court for a possible hearing on a number of threshold jurisdictional issues including (1) whether the transactions at issue involved commerce, (which may require an evidentiary hearing); (2) the principal place of Bio-Analytical's business; and (3) the *res judicata* effect of the State Court's decision that there was in fact no agreement to arbitrate. (565 F.2d at 455.) Only if the District Court rules favor-

[3] In this respect the Seventh Circuit's suggestion (565 F.2d at 454) that the State Court *declined to enforce* the agreement to arbitrate is erroneous. The Court found *there was no agreement* to arbitrate, which finding was affirmed on appeal.

ably for Bio-Analytical on *all* of these issues can it go on to hearing the same witnesses and evidence heard by the State Court some two years ago.[4] After all this, it is likely [we believe inevitable] that the District Court will reach the same conclusion reached by the State Court, *i.e.* that there is no agreement to arbitrate. The case would again be dismissed by the federal court as that is the only relief sought. Bio-Analytical may then appeal that decision (as it and Mark did in the State Court) and the parties, represented by the same counsel, will brief and argue before the Seventh Circuit Court of Appeals the same arguments previously briefed before the Appellate Court of Illinois and decided by that Court.

Defendants respectfully submit that the very prospect of this repetitious litigation and unconscionable waste of judicial manpower [and litigants' resources] supports a grant of *Certiorari* in this case. Upon grant of *Certiorari* Petitioners respectfully submit that we shall demonstrate (1) that the "subsequent" cases relied upon by the Court of Appeals are inapplicable and principles of comity clearly require dismissal; and, (2) that Mark is an indispensable party whose Illinois citizenship acquires dismissal.

THE PENDING STATE ACTION REQUIRED DISMISSAL UNDER ONE DOCTRINE OF COMITY AND FEDERALISM

The doctrine of comity teaches that a court should defer action on causes properly within its jurisdiction until courts of another sovereignty already cognizant of litigation have had an opportunity to pass on the matter.

[4] Evidence was heard in the State Court in November and December, 1975 and the Court ruled on December 19, 1975.

Darr v. *Burford*, 339 U.S. 200, 204 (1950). It has been long recognized that this principle of comity means more than just the utility that comes from concord, but as between State courts and those of the United States, it is a "principle of right, and of law, and therefore of necessity," *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *Covell* v. *Heyman*, 111 U.S. 176.

In *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), this Court held that a district court has authority to stay or dismiss an action in the federal court because of the pendency of a state proceedings.[5] This Court recognized that principles resting on wise judicial administration . . . may govern in situations involving the contemporaneous exercise of concurrent jurisdiction, (424 U.S. at 817.) In assessing the appropriateness of dismissal in the event of an exercise of a concurrent jurisdiction this Court discussed the factors to be considered: (1) Assumption of jurisdiction over a *res* by the State Court (2) the desirability of avoiding piecemeal litigation; (3) the inconvenience of the

[5] Moore in 1A Moore Federal Practice §203[4] (2 ed. 1977) notes that lower federal courts have dismissed federal actions where a state court defendant filed a federal action which puts before the federal court the same issues that were before the state court, which is the identical situation in case at bar. Moore notes that the purpose of the dismissal in such cases is to foster the interest of judicial administration; comprehensive disposition of litigation; conservation of judicial resources and fairness to the parties." All of these interests would be furthered by a dismissal in the present case. *See e.g. PPG Industries, Inc.* v. *Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973); See also, Comment, *Federal Court Stays and Dismissal In Deference to Parallel State Court Proceedings*: *The Impact of Colorado River*, 44 U. of Chi. L.Rev. 641 (1977).

federal forum and (4) the order in which concurrent jurisdiction was obtained. (424 U.S. at 819.)

Two of these factors are clearly present in the present case and support dismissal. First, the desirability of avoiding piecemeal litigation: Bio-Analytical has an opportunity for judicial hearing, which it has readily accepted, in the State Court proceeding. Bio-Analytical (and Mark) vigorously, although unsuccessfully, prosecuted its petition for arbitration in the State Court. The State Court has ruled on a factual basis and, *after a full hearing*, that the Agreement on which Bio-Analytical relies does not require the defendants to arbitrate. Bio-Analytical should not be permitted to relitigate in the District Court the same issue it has unsuccessfully pressed in the State Court.

Secondly, the State Court action was filed before this action. And, although it was filed only minutes ahead of this case, it has now progressed well ahead of this case. There has been a trial on the arbitration issue and a full appeal. Here we have only the filing of a complaint.[6] It would not be unreasonable to suggest that the State proceeding is at least two years ahead of this one.

Moreover, and in total distinction to the case of *Calvert Fire Ins. Co.* v. *Will*, 560 F.2d 792 (7th Cir. 1977) relied on by the Court of Appeals in its opinion, there is no significant federal interest in maintaining this case in the federal court. In its opinion the Seventh Circuit

[6] Another factor present in the case at bar, which the Supreme Court in *Colorado River* found significant and supportive of the dismissal, is there was an absence of any proceeding in the District Court order than the filing of the complaint, prior to the motion to dismiss. (424 U.S. at 820.)

suggested a federal interest in the application of the federal Arbitration Act, 565 F.2d at 454, which it states, "that the State Court has declined" to apply. But, we respectfully suggest, this Conclusion is factually and legally incorrect. First, there was no reluctance by the State Court to apply the federal Act—it was never asked to do so. Instead (perhaps in a recognition that no substantial interstate activity was involved) Bio-Analytical relied on the virtually identical provisions of the State statute, The Uniform Arbitration Act, *Ill. Rev. Stat.* ch. 10 §101 *et seq.* (1975).[7]

But apart from the factual distinctions between this case and *Calvert,* the cases are clearly distinguishable on a legal basis. *Calvert* involved issues arising under the federal Securities Acts, an area in which the federal court has exclusive jurisdiction.[8] Here, if Bio-Analytical desired to rely on the federal Arbitration Act in the State Court [which it does not] it could do so.[9]

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[7] The Federal Arbitration Act, 9 U.S.C. §2, 4 (1970) and Illinois Uniform Arbitration Act (Ill. Rev. Stat. ch. 10 §101 (1975)) are identical in scope and operation. Both Acts provide that a written agreement to arbitrate . . . is valid, enforceable and irrevocable, (Ill. Rev. Stat. ch. 10, §101, 9 U.S.C. §2); both direct the court to order arbitration once the requisite agreement to arbitrate is found, or to dismiss the action if no such agreement existed. Both Acts authorize the Court to stay any other proceeding where the issue therein is referable to arbitration. *Compare* Ill. Rev. Stat. ch. 10, §102 with 9 U.S.C. §§ 3, 4.

[8] The Calvert Court characterized these factors as "compelling factors which weigh heavily against deference to state procedures." 560 F.2d at 796.

[9] The Court of Appeals for the Seventh Circuit expressed concern that "it is not clear that state courts are not equally bound to enforce agreements to arbitrate to which the Act is applicable." 565 F.2d at 454. However,

The total lack of federal interest in the enforcement of the federal Arbitration Act may also be seen by the fact that the Congress provided that jurisdiction under the federal Arbitration Act (9 U.S.C. §4) requires both diversity of citizenship and a contact involving interstate commerce. If there was a congressional concern for the application of the Act, surely it would not be limited to diversity cases. See Comment, Federal Court Stays and Dismissals In Deference To Parallel State Court Proceedings, note 5 *supra* at 44 U. of Chi. L.Rev. 665.

Finally, federal courts have made it clear that despite the federal policy favoring arbitration, it remains a creature of contact. *Lea Tai Textile Co., Ltd.* v. *Manning Fabrics, Inc.,* 411 F.Supp. 1404 (S.D.N.Y. 1975). Therefore in the case at bar, the first issue to be determined under the federal Arbitration Act is whether, under the State law of contract, the parties agreed to arbitration. The State Court determination that no such contract existed, moots any question of application of federal law under the federal Arbitration Act.

For all of the above reasons, the District Court properly determined that principles of comity require that the action be dismissed and the decision of the Court of Appeals is contrary to settled law, sound judicial administration and plain common sense.

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[9] (Continued)
according to Professor Moore, 1A Moore Federal Practice, §0.202 "where an action is in the State Court, but involves a federal matter, the State Court must apply federal substantive law, including federal common law and thus a variance in the substantive rule of law and the attendant evils is avoided."

V.

MARK IS AN INDISPENSABLE PARTY UNDER THE "EQUITY AND GOOD CONSCIENCE" STANDARD OF RULE 19(b)

The determination of whether a party is indispensable [Mark in this case] is governed by Rule 19(b) of the Federal Rules of Civil Procedure. Where joinder of an absent party would destroy diversity jurisdiction the Court must determine if "in equity and good conscience, the action should proceed among the parties before it" or whether the absent party is indispensable, requiring dismissal of the action. The facts in the present case clearly supported the District Court's determination that Mark is an indispensable party. The District Court found that the complaint sought relief of a personal nature for Mark, noting that the agreement expressly provided that "it is the essence of this agreement that Dr. Donald D. Mark shall render all services and perform all duties contemplated under the agreement" and that Mark had personally guaranteed the complete performance of all contractual obligations. The District Court further noted that Mark is a joint obligee with Bio-Analytical. It is fundamental that joint obligees are indispensable parties in an action for the enforcement of rights under a contract. 3A Moore Federal Practice §19.11 (2 ed. 1977).

A careful reading of the agreement clearly rebuts Bio-Analytical's contention that Mark has no rights, and is therefore not a joint obligee thereunder. Mark was expressly given many rights in the Agreement. Among these rights are, (1) "Donald D. Mark, M.D., President of Bio-Analytical in his individual capacity of pathologist and physician is hereby granted status of Department Head and he shall be designated by the title 'Chief of the

Department of Pathology of the Edgewater Hospital' and he shall serve with a vote on the Executive Committee of the Medical Staff." (par. 1); (2) "The Hospital shall . . . provide . . . sufficient laboratory space to meet the needs of the department as determined . . . by Mark." (par. 2); (3) "The Hospital shall bill and collect for clinical and pathology services rendered by Bio-Analytical or Mark"; (4) Dr. Mark is entitled to absent himself for two weeks vacation and one week for attendance at professional meetings. (par. 14); (5) "Bio-Analytical and Mark shall be insured with a satisfactory insurance company . . . with professional liability insurance in the amount of not less than $250,000/$500,000" (par. 14). Clearly Bio-Analytical and Mark are joint obligees seeking to enforce a single duty under the Agreement, *see* 3A Moore Federal Practice, §§19.10, 19.11 (2 ed. 1977).

Further, it is evident in the present case that the interests of Bio-Analytical and Mark are so interwoven, that it would be inequitable to the defendants to proceed to an adjudication without having Mark's interest represented in the action. This Court's statement in *Shields* v. *Barow*, 17 How. 130, 141-2, (1854), is particularly appropriate in this situation:

> Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience . . . are indispensable parties.

In the present case, a reading of the contract shows that the interests of Bio-Analytical and Mark are so en-

twined that a final decree cannot be made without vitally affecting Mark's interest.

A judgment rendered in his absence would not be adequate and indeed may be useless for it would not stop Mark from litigating his claims in State Court. Thus, two factors under Rule 19(b) are met: (1) extent to which a judgment rendered in the person's absence might be prejudicial to . . . those already parties—a judgment rendered in Mark's presence would be inequitable to the defendants, and (2) adequacy of the judgment in the absence of the person[10]—in light of the community of interest of Mark and Bio-Analytical, and the fact that the real dispute relates to Mark's conduct in his individual capacity, a judgment rendered in his absence would not be adequate.[11]

Finally one of the primary purposes of Rule 19(b) is to foster the public interest in economy of litigation. Bio-Analytical had its day in court in the State Court proceeding and indeed fully litigated its claim (along with Mark) regarding arbitration. Thus the fourth and final

[10] The adequacy of the judgment includes the public stake in settling disputes by the whole whenever possible. 3A Moore Federal Practice §19.07-2[0] (2 ed. 1977).

[11] In this and other respects, the present case is factually distinct from that in *Bonnet* v. *Trustees of School Township,* 563 F.2d 831 (7th Cir. 1977), which the Court of Appeals relied on in its decision. In *Bonnet* the Seventh Circuit found that the alleged indispensable party had only an option in the disputed property, contingent on the outcome of the litigation—and therefore there was no advantage to the defendants in joining the party as a plaintiff. In contrast in the present case, defendants have a genuine interest in Mark's joinder, as it is their contention that Mark acted improperly under the agreement.

criteria of Rule 19(b) (whether Bio-Analytical will have an adequate remedy if the action is dismissed for non-joinder) is clearly to be answered in the affirmative. The dismissal of the complaint left the issues between Bio-Analytical, Edgewater and the indispensable Mark in a status where they can be settled in one case. The District Court properly applied the "equity and good conscience" standard of Rule 19(b). The Court of Appeals' decision reversing this determination is erroneous, and, more importantly for purposes of this Petition, contrary to sound judicial administration.

CONCLUSION

For the reasons set out above, Petitioners respectfully submit that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

9 U.S.C. §§2, 3 and 4 provide as follows:

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admirality jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be

dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Ill. Rev. Stat. ch. 10 §§ 101, 102 provide as follows:

UNIFORM ARBITRATION ACT

AN ACT relating to arbitration and to repeal an Act therein named. Approved Aug. 24, 1961. L. 1961, p. 3844. Be it enacted by the People of the State of Illinois, represented in the General Assembly:

101. §1. Validity of arbitration agreement.

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.

102. §2. Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. That issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 17, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

BIO-ANALYTICAL SERVICES, INC., a corporation,

Plaintiff,

vs.

THE EDGEWATER HOSPITAL, INC., a corporation; and DR. MAURICE S. MAZEL,

Defendants.

No. 75 C 2296

MEMORANDUM OPINION

JOEL M. FLAUM, *District Judge*:

Before the court is defendants' motion to dismiss plaintiff's complaint seeking damages for an alleged breach of contract and an order to compel arbitration. Also before the court is the plaintiff's motion for an order compelling arbitration of the dispute between the parties. As the court has determined that it lacks jurisdiction in this cause, the motion for an order compelling arbitration is DENIED.

The defendants raise three grounds in support of its motion to dismiss for lack of jurisdiction: failure to join an indispensable party, failure of plaintiff to obtain a certificate of authority and comity. For the reasons set forth herein, the court finds that the defendants' objections to jurisdiction are well taken. Accordingly, the defendants' motion to dismiss is GRANTED.

The undisputed facts indicate that plaintiff Bio-Analytical and defendant Edgewater Hospital entered into an agreement by which Bio-Analytical and Dr. Donald Mark, its president, would perform services for the Department of Pathology. The agreement (Exhibit B to Motion to Dismiss) expressly provides that "it is the essence of this agreement that Dr. Donald D. Mark shall render all services and perform all duties contemplated under this agreement." Dr. Mark personally guaranteed the complete performance of all contractual obligations. The complaint seeks relief of a personal nature for Dr. Mark. The court finds that Dr. Mark is a joint obligee with plaintiff Bio-Analytical, and Dr. Mark is an indispensable party to this action. *See e.g. Link* v. *Celebrezze,* 236 F. Supp. 599 (D.C. Pa. 1964). His absence requires dismissal pursuant to Rule 19(b).

The court also notes that principles of comity preclude the exercise of federal jurisdiction in this cause. See, *Toucey* v. *New York Life Insurance Co.,* 314 U.S. 118. The Circuit Court of Cook County first acquired jurisdiction over the controversy and the relief plaintiff seeks in this court is fully available in the State Court proceeding.

For the reasons set forth above, the defendants' motion to dimiss is Granted and this cause is hereby dismissed.

DATED: August 1, 1975

Joel M. Flaum
.....
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 75-1885

BIO-ANALYTICAL SERVICES, INC., a corporation,
Plaintiff-Appellant,

vs.

THE EDGEWATER HOSPITAL, INC., a corporation; and DR. MAURICE S. MAZEL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 2296—JOEL M. FLAUM, *Judge.*

ARGUED APRIL 5, 1976—DECIDED OCTOBER 28, 1977

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and WYZANSKI, *Senior District Judge.*•

FAIRCHILD, *Chief Judge.* Bio-Analytical Services, Inc., a New York corporation, contracted with Edgewater Hospital, Inc., an Illinois corporation, to provide certain professional services for Edgewater. Edgewater owns and operates a hospital and the required services were in connection with the operation of Edgewater's Department of Pathology. Dr. Mark, an Illinois resident, is president of Bio-Analytical. He is not, in form, a party to the contract as an individual, although the contract makes it very clear that the contemplated services were

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• Senior District Judge Charles E. Wyzanski, Jr. of the District of Massachusetts is sitting by designation.

actually to be performed by Dr. Mark. A "Personal Guarantee" was appended to the contract in which Mark guaranteed performance, but agreed that all compensation was to be paid to Bio-Analytical, with no separate payment to him. The contract also contained an arbitration clause, the applicability of which is in dispute.

On July 14, 1975, Edgewater filed a complaint in the Circuit Court of Cook County against Bio-Analytical and Dr. Mark, alleging that the agreement was terminated as a result of the material breach of Dr. Mark. The complaint requested damages and an accounting. Approximately eighteen minutes later, Bio-Analytical filed suit in federal district court against Edgewater and Dr. Maurice S. Mazel, its Medical Director, alleging a breach of the agreement. The complaint alleged jurisdiction by reason of diversity, and prayed for damages and injunctive relief against the withholding of property of Bio-Analytical and Dr. Mark and the interference with mail addressed to Bio-Analytical or Mark. In a separate count, Bio-Analytical's complaint prayed for an order compelling arbitration of all grievances pursuant to the Federal Arbitration Act, 9 U.S.C. § 4.

The district court found Dr. Mark, an Illinois resident, whose joinder as plaintiff would destroy diversity, to be an indispensable party so that dismissal was required. The district court further held that principles of comity precluded the exercise of federal jurisdiction because of the earlier suit in state court. This appeal followed. For the reasons hereinafter stated, we reverse.

I. The Indispensable Party Claim

The determination of whether a party is indispensable is governed by Rule 19 of the Federal Rules of Civil Procedure. Rule 19 requires a two-step analysis. Rule 19(a) lists certain criteria to be used in ascertaining whether an absent person should be joined if feasible, but only if such joinder will not deprive the court of jurisdiction. If, as in the present case, joinder of an absent party would destroy diversity jurisdiction, 19(a) is inapplicable. *See, Bonnet* v. *Trustees of Schools of Township 41 North,* No. 75-1923 (7th Cir. Sept. 26, 1977) (slip opinion at 4). The relevant inquiry for the court then becomes whether, under Rule 19(b), "in equity and good conscience the action shall proceed among the parties before it" or whether the absent party is indispensable requiring dismissal of the action. The Rule lists four factors which must be weighed in making this judgment: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which such prejudice can be avoided by the shaping of relief; (3) the adequacy of the judgment in the absence of the person; and (4) the availability of an adequate remedy for the plaintiff if the action is dismissed from non-joinder. Generally, Rule 19 entails a pragmatic approach, focusing on realistic analysis of the facts of each case. *Provident Bank* v. *Patterson,* 390 U.S. 102 (1968). In making this pragmatic determination, the district court "should state the facts and reasons upon which it acts." *Manygoats* v. *Kleppe,* 558 F.2d 556 (10th Cir. 1977).

With this understanding of Rule 19, we turn to the facts of the present case. The district court held that Dr. Mark was an indispensable party:

> The complaint seeks relief of a personal nature for Dr. Mark. The court finds that Dr. Mark is a joint obligee with plaintiff Bio-Analytical, and Dr. Mark is an indispensable party to this action. *See e.g., Link* v. *Celebrezze,* 236 F.Supp. 599 (E.D. Pa. 1964). His absence requires dismissal pursuant to Rule 19(b).

The court's statement does not demonstrate that the court considered the "equity and good conscience" standard of Rule 19(b) nor the rule's four criteria. Once the "equity and good conscience" test is applied, we conclude that Dr. Mark is not an indispensable party.

Although Mark's guarantee may make him, in substance, a joint obligor, it is clear that he is not a joint obligee since Edgewater's obligations under the contract run solely to plaintiff, 3A J. Moore, Federal Practice, § 19.11 at 2361 (2d ed. 1975). The court's reference to relief sought in favor of Dr. Mark is doubtless based on the prayer in Count I for injunctive relief to protect Mark's individual, as well as Bio-Analytical's property. The property in question, however, seems to have been turned over pursuant to agreement reached at the hearing of the application for preliminary injunction, and the claim for injunctive relief thus mooted before decision of the district court.

Other than the now moot claim over property, Bio-Analytical also asserted in Count I a breach of the contract and sought damages. As it recognizes in its brief on appeal, Count I is a statement of the grievance on which it seeks arbitration in Count II. It obviously cannot be granted the relief sought on both counts. But whether we focus on the claim for damages or the claim for compelled arbitration, we do not find Dr. Mark indispensable under Rule 19(b).

If we assume a judgment for or against Bio-Analytical on Count I, or awarding or denying it arbitration on Count II, we are unable to perceive any prejudice to Dr. Mark or either of the parties on account of his absence as a party.[1] Moreover, a judgment will be entirely adequate in Dr. Mark's absence.[2] Edgewater will not be

[1] We recognize that Dr. Mark appears to be the sole officer of Bio-Analytical. However, the legal sufficiency of the corporate entity has not been challenged.

[2] *Link* v. *Celebrezze*, 236 F. Supp. 599 (E.D. Pa. 1964), cited by the district court for the proposition that Dr. Mark is an indispensable party, is plainly distinguishable. In *Link*, plaintiff, a discharged government employee, brought an action against the secretary of HEW to seek reinstatement. Plaintiff, however, failed to join members of the Civil Service Commission as defendants. Since the

subjected to a significant risk of a later action by Dr. Mark since, under the contract, Mark receives compensation from Bio-Analytical rather than Edgewater.[3] We recognize that the pending state court action brought by Edgewater would provide an alternative forum thus arguably satisfying the fourth criteria of 19(b), the availability of an alternate remedy in the event of dismissal. We note, however, that the state court action was initiated by Edgewater and, in any event, "we do not view the availability of an alternate remedy, standing alone, as a sufficient reason for deciding that the action should not proceed among the parties before the court." *Bonnet, supra* (slip opinion at 6). We realize that Edgewater would reasonably desire to have Mark as well as Bio-Analytical a party in connection with Edgewater's claim that Mark and Bio-Analytical performed improperly, but this does not make Mark an indispensable plaintiff.

II. *The Comity Claim*

The district court also held that comity precluded it from exercising jurisdiction because of the prior state court action commenced by Edgewater. While the district court may have been correct in its application of the law at the time of its opinion, subsequent developments have undermined its rationale.

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[2] (Continued)
Civil Service Commission had affirmed the dismissal of plaintiff, the court held that its members were indispensable parties with the named defendant neither able nor authorized to grant the relief sought.

In the present case, by contrast, a court could readily order arbitration in an action by Bio-Analytical against Edgewater. Indeed, Dr. Mark has no right to demand arbitration under the contract.

[3] The only risk of repetitious suits faced by Edgewater results from its own suit in state court. Moreover, the only danger is inconsistent judgments on the arbitration issue.

In *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800 (1976), decided after the district court's decision, the Supreme Court articulated the controlling legal standard to justify dismissal of an action in federal court where jurisdiction is properly invoked because of a concurrent proceeding in state court. When parallel actions exist in state and federal courts, the general rule is that the state court action is no bar to proceedings concerning the same subject matter in federal court. *Id.* at 817. The Court recognized, however, that there are circumstances which could justify a federal court from declining to exercise jurisdiction due to a pending state suit despite "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* However, the circumstances permitting a federal court to decline to exercise jurisdiction when there is a concurrent state action "are considerably more limited than the circumstances appropriate for abstention." *Id.* at 818. In determining whether a parallel action in state court is grounds for declining to exercise properly invoked federal jurisdiction,

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. [citation omitted.] Only the clearest of justifications will warrant dismissal.

420 U.S. at 818-19.

Factors which the Court indicated might justify a dismissal included: (1) the assumption of jurisdiction over a *res* by the state court; (2) the desirability of avoiding piecemeal litigation; (3) the inconvenience of the federal forum; and (4) the order of initiation of the two actions.[4]

[4] In *Colorado River*, the Court found the exceptional circumstances necessary to justify deference to a state court proceeding. The United States had brought a suit in federal court asserting certain water rights claims. One of the defendants then attempted to make the United States a party to a state court action to facilitate adjudication of all the Government's claims. In affirming the dismissal of the federal suit, the Court primarily relied on the McCarran Amendment, 43 U.S.C. § 666, which provides consent for joining the United States in a state suit for adjudication of water rights. The amendment demonstrated a federal policy of avoiding piecemeal litgation and disrupting of a state's system of allocation and adjudication of water rights. Moreover, the state proceeding was in no respect inadequate to resolve the federal claims. 424 U.S. at 820.

This court has recently applied *Colorado River in Calvert Fire Insurance Co.* v. *American Mutual Reinsurance Co.*, No. 76-1495 (7th Cir. Aug. 15, 1977). In *Calvert*, we found no "exceptional circumstances," slip opinion at 7, to justify a stay of an action in federal court brought under the federal securities laws despite the existence of a pending state action involving substantially identical issues. We noted that the federal forum was not inconvenient for any of the parties, the state and federal courts acquired concurrent jurisdiction on the same day, and the exclusive jurisdiction of the federal courts of federal securities matters all weighed against deference to state proceedings.

Colorado River and *Calvert* may not inevitably require a federal district court to exercise jurisdiction founded solely on diversity where the federal action was started later than a state court action embracing the same issues, but not removable. Here, however, Bio-Analytical relies on the Federal Arbitration Act. Although it is not clear that state courts are not equally bound to enforce agreements to arbitrate to which the Act is applicable, we do know in the present circumstances that the state court has declined to do so. Under these circumstances, we cannot permit a federal district court to defer to a state court on comity grounds in view of the importance

of the Federal Arbitration Act.[5] *See Galt* v. *Libbey-Owens-Ford*, 376 F.2d 711 (7th Cir. 1967).

Toucey v. *New York Life Ins. Co.*, 314 U.S. 118 (1941), relied upon by the district court, is inapposite. *Toucey* established that a federal court had power to enjoin proceedings in a state court which interfered with the *res* over which it had prior jurisdiction, thereby creating an implied exception to the then existing anti-injunction statute. When the statute was amended in 1948, this power of federal courts was codified by the second exception in 28 U.S.C. § 2283 which permits a federal court to enjoin a state proceeding "where necessary in aid of its jurisdiction." *See*, IA Moore's Federal Practice, § 0.218 [2]-[3] (2d ed. 1975). *Toucey* clearly provides no support for the district court's dismissal of a federal suit because of a parallel state proceeding in an *in personam* action.[6]

III. *Other Contentions Raised by the Parties*

The parties raise various other issues such as whether the contract provided for mandatory arbitration, whether substantial interstate activity was involved as

[5] Appellants contend that the Federal Arbitration Act denied federal courts the discretionary power to decline to exercise jurisdiction because of a pending state proceeding. In light of our disposition of this case, we need not reach this question.

[6] Edgewater here asserts that the action of the district court may have rested on Section 48(1)(c) of the Illinois Practice Act which provides that "another action pending between the same parties for the same cause" is grounds for dismissal. Illinois Revised Statute, Chapter 110, § 48(1)(c) (Smith Hurd, 1956). Since Edgewater did not raise this provision by motion, any defense based on it was waived. *Seaboard Finance Co.* v. *Davis*, 276 F. Supp. 507, 518 (N.D. Ill. 1967). We intimate no views on the applicability of this section if there had been no waiver.

alleged and as required by the Federal Arbitration Act, and whether the federal suit was precluded by *res judicata* as a result of the state court's denial of arbitration.[7] None of these issues is relevant to the existence of federal jurisdiction and none was considered by the lower court. The question whether the transaction involves "commerce" may well require an evidentiary hearing. Having concluded that the district court should exercise jurisdiction, these other issues are left to further proceedings in that court.

The judgment appealed from is reversed and the cause remanded for further proceedings.

[7] The Edgewater defendants moved to dismiss this appeal, asserting that the state court's declination to order arbitration is *res judicata*. Bio-Analytical disputes this conclusion. In any event, this is a matter going to the merits of the present action, and does not demonstrate that the appeal is frivolous, or improperly before us. The motion to dismiss the appeal is denied.

APPENDIX C

76-84

THE EDGEWATER HOSPITAL, INC., a corporation,
Plaintiff-Appellee,

v.

BIO-ANALYTICAL SERVICES, INC., a corporation, and DONALD D. MARK,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.
Honorable Francis Delaney, *Judge Presiding.*

Miss Justice McGillicuddy Delivered the Opinion of the Court:

Bio-Analytical Services, Inc. (Bio-Analytical) and its president, Dr. Donald D. Mark, bring this interlocutory appeal from an order of the Circuit Court of Cook County denying their motion to compel arbitration of a dispute between Bio-Analytical and the Edgewater Hospital, Inc. (Edgewater). On appeal, Bio-Analytical seeks to have this order reversed and to have the cause remanded for entry of an order to compel arbitration and to stay and enjoin all proceedings pending such arbitration.

The controversy which is the subject matter of the present action developed out of a contractual agreement entered into by Bio-Analytical and Edgewater on September 30, 1972. Pursuant to this agreement, Bio-Analytical was to manage the clinical laboratory and pathology department at Edgewater. Bio-Analytical performed those services until mid-July 1975 when Edgewater initiated an action in the Circuit Court of Cook County for damages and an accounting on the grounds that Bio-Analytical and its president, Dr. Mark, had fraudulently used the supplies, equipment and personnel of Edgewater for their own personal gain, profit and benefit.

Rather than answering the complaint, Bio-Analytical filed a motion and application under sections 1 and 2 of

the Uniform Arbitration Act (Ill.Rev.Stat., 1975, ch. 10, pars. 101 and 102) to stay all proceedings and to compel the plaintiff to proceed to arbitration of all issues between the parties pursuant to paragraph 12 of their agreement. That paragraph provides as follows:

> "12. AGREEMENT ARBITRATION. If any disputes may hereafter develop between the parties with respect to the interpretation or construction of this agreement or for any other reason arising from the relationship between the parties, the same shall be determined and settled under the rules for compulsory arbitration by virtue of which each party shall select an independent representative and the two representatives so selected shall jointly select a third representative. The panel of three arbitrators thus appointed shall meet with the parties and arbitrate the dispute. The parties agree to abide by the findings and recommendations of the panel. In cases where this procedure is undertaken each party shall share one-half of the total expense of arbitration. In all arbitration cases an aggrieved party shall select its arbitrator and upon written notice to the other party, the other party shall select its arbitrator within one week of notice from the first party and the three arbitrators shall reach a conclusion to the problem within two weeks of the appointment of the third arbitrator. In the event either party should fail to select an arbitrator within the period specified then either party shall have the right to immediately institute appropriate proceedings in a court of competent jurisdiction."

The hospital moved to strike the motion for arbitration on two alternative grounds: that the dispute was not covered by the arbitration agreement or, that under paragraph 12, arbitration was not mandatory.

At the request of the trial court, the attorneys who negotiated the contract for the two parties appeared as witnesses at the evidentiary hearing on the motions; Ben Sherwood testified for Bio-Analytical and Joseph Stein appeared for Edgewater. The testimony of the two

attorneys and the accompanying documentary evidence showed that the original draft of the contract had been written by Sherwood based upon a form contract which Dr. Mark had found in a professional publication. The arbitration clause in this first draft was identical to the clause in the executed contract with the exception that the first draft did not include the last sentence of paragraph 12. Sherwood's original draft was forwarded to Edgewater, whereupon Edgewater had Stein examine it. It was at this time that the last sentence of paragraph 12 was added.

Copies of this second draft were then sent by Edgewater's director, Dr. Mazel, to Dr. Mark on September 21, 1972. In the accompanying letter, Mazel informed Mark that:

> ". . . since we have never been affiliated with a corporation before, it leaves us sort of a dilemma regarding some of the items. Therefore, we have referred it to our attorney for further evaluation and trust this will meet with your approval."

Later, with specific reference to the arbitration clause, Mazel stated:

> "We are not exactly clear on Item #12, the arbitration agreement, but feel certain this can be adjusted amicably if and when a problem arises."

On September 22, 1972, Stein sent a letter to Dr. Mark. He stated that it was his belief that there was "no substantial change in your agreement." There was no specific reference to the arbitration clause in this letter.

On September 25, 1972, Sherwood and Mark met to discuss the draft tendered by Mazel. On that date, Sherwood also talked with Stein by phone. Although Sherwood recalled a number of subjects which were specifically discussed, he did not recall having discussed the changes in paragraph 12. Similarly, his notes made pursuant to that conversation contained no reference to a discussion on the arbitration clause. Stein, on the other hand, testified that he and Sherwood did talk about the arbitration

provision during their phone conversation. He stated that he specifically told Sherwood that the hospital did not want to agree to bind themselves to arbitration and that the last sentence was added to provide an option for either party to seek a legal resolution of any dispute.

On December 23, 1975, the Circuit Court of Cook County denied Bio-Analytical's motion to compel arbitration on the grounds that under the terms of the agreement, arbitration is optional rather than mandatory. The court further ordered Bio-Analytical to answer or otherwise plead to the allegations in Edgewater's complaint but stayed the effect of the order pending appeal.

In essence, Bio-Analytical presents two principal questions for review: whether the trial court's determination that the agreement does not provide for mandatory arbitration of disputes is erroneous, and assuming that arbitration is mandatory, whether the present dispute is within the scope of the arbitration agreement. Prior to reaching those considerations, however, we must first review several evidentiary issues raised by the defendant.

First, Bio-Analytical challenges the propriety of admitting testimony by the two attorneys on the contract negotiations. Bio-Analytical presents the issue as a question of the merger of prior negotiations into the final contract and as the additional problem of the admissibility of parol evidence and argues that either doctrine serves to bar the admission of this evidence. Edgewater, on the other hand, characterizes the issue as one of contract interpretation. They suggest that the central concern in the interpretation of a contract is to effect the intent of the parties and, to this end, extrinsic evidence is always admissible.

We believe that Edgewater's characterization of the issue is more reasonable. Where the language of an instrument is ambiguous or uncertain, extrinsic evidence may be introduced to aid in the interpretation of the document so as to effectuate the intent of the parties. *Weiland Tool & Mfg. Co.* v. *Whitney* (1969), 44 Ill.2d 105, 251 N.E.2d 242; *Martindell* v. *Lake Shore Natl. Bank*

(1958), 15 Ill.2d 272, 154 N.E.2d 683. Although neither party takes the position that paragraph 12 of the contract is ambiguous, it is clear from the record that the trial court believed it to be ambiguous and we feel that its belief is justified.

The interpretation problem in the present case relates to the meaning of the last sentence of paragraph 12 of the agreement. There are, we believe, two possible modes of interpreting the sentence. On the one hand, it might be construed as providing a means by which either party could take a dispute to court rather than submitting it to arbitration. The effect of such an interpretation is, of course, to make arbitration optional. On the other hand, the sentence might be read as authorizing either party to go to court to force the other party to fulfill its duties under the arbitration clause. Under this interpretation, arbitration would be mandatory.

Neither interpretation is compelled by the language of the clause. An interpretation of the last sentence as providing for the optional use of arbitration is at odds with the language of the rest of the clause which clearly discusses arbitration in mandatory terms. At the same time, Bio-Analytical's construction of the last sentence of paragraph 12 causes a semantic conflict with respect to several phrases in that final sentence. To read the last sentence as authorizing the use of court proceedings to compel arbitration, the second use of the phrase "either party" must effectively be read as the "other party." In addition, the term "within the period specified" is ambiguous insofar as there exists no time limit for the "aggrieved party," as defined in the first portion of the clause, to select an arbitrator. Furthermore, in the absence of the last sentence, the parties would still have the ability to utilize the courts to compel arbitration pursuant to section 2 of the Uniform Arbitration Act (Ill.Rev.Stat., 1975, ch. 10, par. 102). The existence of these two possible interpretations, therefore, compels us to find that the trial court was justified in hearing extrinsic evidence on the intent of the parties.

Bio-Analytical also complains that the trial court improperly denied Sherwood the opportunity to testify about his understanding regarding the last sentence of paragraph 12. The court prohibited this testimony on the grounds that Sherwood had earlier stated that he had no recollection of ever having discussed the arbitration clause with Stein. Even if this evidence was improperly excluded, we do not feel that Bio-Analytical suffered any prejudice.

A judgment will not be reversed for error unless it appears that such error affected the outcome of the trial. *Baker* v. *Baker* (1952), 412 Ill. 511, 107 N.E.2d 711; *Shafer* v. *Northside Inn, Inc.*, (1963), 44 Ill.App.2d 86, 194 N.E.2d 5. It is difficult to conceive how the admission of this evidence would have led the trial court to a different conclusion. Bio-Analytical challenged the credibility of Stein's version of the September 25th telephone conversation, countered Edgewater's claim that Sherwood entered into an aggreement with Stein that arbitration was optional and argued that they considered arbitration to be mandatory under the terms of the contract. However, the court chose to reject these arguments and to accept the interpretation offered by Edgewater, and we are doubtful that this decision would have been altered by the addition of the disputed testimony.

We now reach the question of whether the trial court's determination that the parties agreed to the optional arbitration of disputes was erroneous. Stein's testimony, if believed, establishes that he expressly informed Sherwood that Edgewater would not agree to the mandatory arbitration of disputes. Edgewater's insecurity over the use of arbitration is clearly corroborated by statements in Dr. Mazel's letter of September 21, 1972. In addition, Dr. Mazel's statement in that letter that the arbitration issue "can be adjusted amicably if and when a problem arises," comports with the view that the parties intended the last sentence to provide for optional arbitration. We are not concerned that Stein in his letter to Dr. Mark on September 22, 1972, suggested that there had been "no

substantial change" from the original draft of the contract for, in view of the fundamental agreement of the parties on the other items in the contract, we feel that it was reasonable for Stein to conclude that the alteration of the arbitration clause was not a substantial change.

On the other hand, Sherwood testified that he did not recall that the arbitration clause had been discussed, a position which was corroborated, to a degree, by the absence of any reference to paragraph 12 in his notes made pursuant to that phone conversation. From this statement, it may fairly be inferred that either the subject was discussed and the witness simply could not recall the discussion or that arbitration was not, in fact, discussed with Stein.

In effect, the testimony of both witnesses was highly self-serving in nature, thus the resolution of the question turns upon the assessment of the credibility of the witnesses. It is well established that a reviewing court will not substitute its judgment as to the credibility of the witnesses for that of the trier of fact unless the finding made is against the manifest weight of the evidence. *Brown* v. *Zimmerman* (1959), 18 Ill.2d 94, 163 N.E.2d 518; *Daniels* v. *Police Board* (1976), 37 Ill.App.3d 1018, 349 N.E.2d 504. Manifest weight has been defined as that weight which is clearly evident, clear, plain and undisputable. *Singles* v. *Horwitz* (1975), 34 Ill.App.3d 973, 342 N.E.2d 220; *Relli* v. *Leverenz* (1974), 23 Ill.App.3d 718, 320 N.E.2d 169. Since we cannot say that the determination of the trial court contravenes this standard, we hold that, pursuant to paragraph 12 of the agreement, the arbitration of disputes is optional.

Since this determination is dispositive of this appeal, we do not need to address ourselves to the question of whether the dispute was within the scope of the arbitration agreement. For the above stated reasons, we affirm the decision of the Circuit Court of Cook County and remand the case for further proceedings not inconsistent with our decision.

Affirmed.

JIGANTI, *P.J.*, and MCNAMARA, *J.*, concur.